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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE RUBEROID CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 95) is reported at 189 F. 2d 893. The opinion on rehearing (R. 118) is reported at 191 F. 2d 294.

JURISDICTION

The decree of the Court of Appeals was entered on September 5, 1951 (R. 123-124). The petition for a writ of certiorari was filed on November 26, 1951, and was granted on January 28, 1952 (R. 131). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1). 

QUESTION PRESENTED

The Federal Trade Commission, after appropriate proceedings, issued an order pursuant to Section 2 of the Clayton Act, directing Ruberoid to cease and desist from certain discriminatory pricing practices. Ruberoid filed a petition in the Court of Appeals under Section 11 of the Act to set aside or to modify the order. The court affirmed the order, but refused the Commission's request that it be enforced.

The question presented is whether the court erred in failing to enforce the Commission's order.

STATUTE INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended by Public Law 899, 81st Cong., 2d Sess., 15 U. S. C., Supp. IV, 21, provides in part:

* * * *

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and

transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, ex-

cept that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. * * *

STATEMENT

On July 26, 1943, the Federal Trade Commission issued a complaint against Ruberoid pursuant to Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13 (a): The complaint charged unlawful price discrimination by Ruberoid in its interstate sales of roofing and allied products, and that the effect of the price discrimination had been, or might be, substantially to lessen competition among purchasers from Ruberoid (R. 1-4). Ruberoid's answer admitted that many of its customers were in competition with each other, and that it granted wholesalers a greater discount than that granted retailers and "applicators"¹ (R. 6). It denied, however, that it discriminated and that its practices were or might be injurious to competition. It pleaded affirmatively that its price differentials were justified by cost factors, or were made in good faith to meet competition (R. 6-7).

Evidentiary hearings were held before a trial examiner in New Orleans, Louisiana, in March, 1946 (R. 7-56, 79-80, 82, 84).² The Commission called as witnesses the sales manager of Ruber-

¹ "Applicators" refers to roofing contractors who applied Ruberoid products on contract jobs for which they were paid as a whole. (R. 5, 96).

² No evidence was taken after these hearings were concluded, but the record was not closed until June 7, 1948, at a formal hearing held in Washington, D. C. (R. 57, 79-80).

oid's southern division and a number of persons engaged in the roofing business in the New Orleans area, and introduced into evidence a number of documentary exhibits. Ruberoid did not call any witnesses or offer any proof. It admitted the giving of the discounts (R. 6, 9, 12), but denied that it had ever "discriminated" in price between its customers (R. 6). Although Ruberoid's answer sought to justify the practices by reference to "competitive conditions in the industry", it offered no proof in support of this claim. Nor did Ruberoid present any evidence that the discount practices had been discontinued; on the contrary, the testimony of its southern sales manager clearly suggested that such practices were continuing (R. 12, 20-21).

The trial examiner filed a recommended decision (R. 56-77) in which he concluded that Ruberoid had violated Section 2 (a) of the Act. Exceptions thereto were filed (R. 77-84), briefs were submitted, and the Commission heard oral argument (R. 86).²

On January 20, 1950, the Commission issued its findings of fact and conclusion (R. 86-90). It found that Ruberoid had discriminated in price by selling its product to some of its customers at prices lower than those at which it sold products of like grade to other customers who were competing with the favored customers (R. 87); that

such differentials were not justified by lower costs (R. 89) / and that the effect of such price discrimination may be substantially to lessen and to injure, destroy or prevent competition among Ruberoid's customers (R. 89). The Commission concluded that Ruberoid's price discriminations were violative of Section 2 (a) of the Clayton Act (R. 90). It accordingly issued an order directing Ruberoid to cease and desist from discriminating in price (R. 90-91).—

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products.

Ruberoid then filed in the court below a petition to set aside or to modify the order (R. 91-94). It did not seriously contest issuance of some form of order against it, but contended that the order was too broad and that it should accordingly be set aside or, alternatively, modified to include certain exemptions and provisos (R. 92-94, 96-97)³. Overruling these contentions, the court unanimously held that the order was within the Commission's authority and that the order "must therefore stand, for appropriate enforcement" (R. 97-99). The final line of the court's

³ These contentions are the subject of Ruberoid's cross-petition in No. 504, this Term, briefed separately by the Government.

opinion reads: "Order affirmed; enforcement granted" (R. 99).*

Ruberoid filed a petition for rehearing directed solely to the question of enforcement (R. 100). It contended that the Commission was not entitled to enforcement "as a matter of right or of course" upon affirmance of the order; that enforcement should be granted only upon a showing of actual or threatened violation of the order; and that a party affected by a cease and desist order may challenge its validity or scope "without subjecting itself to a court injunction" (R. 100-101).

The court granted the petition for rehearing (R. 123), holding that the portion of its decision directing enforcement was "premature" and should be stricken (R. 119, 122-123). The court stated that if the Commission had petitioned for enforcement, it would have been required to show that a violation of the order "has occurred or is imminent," and that there is no convincing reason why the Commission should not be "required to make the same showing" of a threatened violation when the proceeding is brought by a private party to set aside the order (R. 119). The court also stated that there was "uncontra-

*The Commission did not file a formal cross petition for enforcement. However, in the closing paragraph of its brief it requested that the court affirm and enforce the order (R. 110-111, 119).

dicted evidence" that the practice against which the Commission's order was directed "has been abandoned" (*ibid.*).

Judge Clark, dissenting, stated that the cases "have consistently ruled" that where a respondent petitions for review, the matter is "ripe for full decision," and that "two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished" (R. 120); that the cases in support of this proposition "are too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate" (*ibid.*); and that the court's modification of its order would "tie up commission practice with merely repetitious hearings" (R. 121), thus tending to "fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one" (R. 119). Judge Clark also concluded that the majority was "seriously in error" in suggesting that there was uncontradicted evidence of abandonment of the practice in question (R. 121).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

(1) In failing to grant enforcement of the order which it duly affirmed.

(2) In holding that the Commission was not entitled to enforcement of the order in the absence of a showing of noncompliance.

(3) In concluding that there was uncontradicted evidence of abandonment of the illegal practices prohibited by the order.

SUMMARY OF ARGUMENT

The general legislative pattern relating to administrative cease and desist orders usually provides either penalties for their violation, or proceedings by the agency to enforce them. Orders issued by the Federal Trade Commission under Section 11 of the Clayton Act are subject to the latter provision. This Court has indicated that it does not construe the statute to require proof of violation as a prerequisite to enforcement. *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, rehearing denied 302 U. S. 779. This construction is supported by the statutory language, and is in accord with the rule that equity may go "much farther" to give relief "in furtherance of the public interest" than "when only private interests are involved." *Virginian Railway Co. v. System Federal No. 40*, 300 U. S. 515, 552.

It is unnecessary, however, for the Court to decide in this case whether, on a Commission petition for enforcement, a showing of disobedience of the Commission order is required. Whatever the merits of requiring proof of violation prior to enforcement when the Commission is the moving party, there is no basis for imposing this requirement where the issue of enforcement

arises on a petition to review filed by the affected party.

I

A. Cease and desist orders of the Federal Trade Commission under the Clayton Act can come before a court of appeals either on an affected party's petition to review, or on a Commission application for enforcement. Upon a petition to review, the court of appeals has both the *power* and the *duty* to enforce the order if it affirms it. Actual or threatened violation of the order need not be shown as a prerequisite to enforcement.

A showing of noncompliance when the Commission seeks enforcement may be required to avoid unduly burdening the courts. Where, however, the matter already is before the court on a petition to review, enforcement would impose no additional burden on the court. To require a showing of violation in such circumstances would handicap effective enforcement of the Act. The almost unvarying judicial practice, both in this Court and in the courts of appeals, has been to enforce upon affirmance. E. g., *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 730; *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760.

B. A mere showing of abandonment of the illegal practices is no bar to enforcement. The Commission is not precluded from issuing a cease

and desist order under Section 5 of the Federal Trade Commission Act merely because the practices have been discontinued. *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260. Nor does an employer's compliance with an order of the National Labor Relations Board bar the Board from obtaining enforcement of the order. *National Labor Relations Board v. Mexia Textile Mills*, 339 U. S. 563. These cases, which are in all respects analogous to this, indicate that a violator cannot block enforcement of a valid Commission order merely by showing abandonment, and thus remain free to resume the illegal practices as soon as the judicial proceedings have been concluded.

II

If enforcement is a matter for the court's discretion, the court abused such discretion by denying enforcement in this case. Even if enforcement of a valid order is not required in all cases by statute, the court should exercise its discretion by following the customary judicial practice of granting enforcement on petitions to review unless a violator can show special circumstances calling for an exception. Mere abandonment is not enough to justify nonenforcement; the burden is on the party resisting enforcement to show that "there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum*

Co. of America, 148 F. 2d 416, 448 (C. A. 2) (L. Hand, C. J.).

Thus the court of appeals' conclusion that there was "uncontradicted evidence" of abandonment, even if correct, would not justify refusal of enforcement. Moreover, it is clear that the record does not support this conclusion of abandonment.

ARGUMENT

INTRODUCTION

Ruberoid concedes (Brief in Opposition to Petition, p. 3), as, indeed, it must, in the light of decisions of this Court,⁵ that in a proceeding brought by the affected party to set aside a Commission cease and desist order, the courts have power, if they sustain the order's validity, to enforce it. It argues, however, that enforcement ought not be granted unless the Commission shows that its order has been violated, or that violation is threatened. This view was adopted by the court below. It is based upon the assumptions (1) that under the statute enforcement cannot be obtained in a proceeding brought by the Commission unless there has been such a showing, and (2) that the same principle should be applied where enforcement is sought in a proceeding

⁵ See, e. g., *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 730, and *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760, discussed *infra*, pp. 28-29. Decisions of the courts of appeals to the same effect are collected, *infra*, n. 12.

brought by an affected party to set aside the order. Neither of these assumptions is correct.

Legislation providing for the issuance of administrative prohibitory orders generally also provides sanctions for violation of such orders. For example, there are statutory penalties for violation of cease and desist orders issued by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U. S. C. 45 (1). Where no such penalty is provided, the agency ordinarily may procure judicial enforcement upon a showing that the order is valid, *e. g.*, Section 10 (e) National Labor Relations Act, 49 Stat. 454, 29 U. S. C. 160 (e).

No penalty is provided for violation of cease and desist orders issued by the Federal Trade Commission under the Clayton Act. The Commission is given the usual right to seek judicial enforcement. However, the courts of appeals in four circuits have held that the Commission is required, if it institutes the proceedings, to show that the order has been violated before it can obtain enforcement.⁶

⁶ *Federal Trade Commission v. Herzog*, 150 F. 2d 450 (C. A. 2); *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. 2d 474 (C. A. 4); *Federal Trade Commission v. Standard Education Soc.*, 14 F. 2d 947 (C. A. 7); *Federal Trade Commission v. Whitney & Co.*, 192 F. 2d 746 (C. A. 9). These were enforcement proceedings brought under Section 11 of the Clayton Act or under Section 5 of the Federal Trade Commission Act prior to its amendment in 1938 by the Wheeler-Lea Act. Judge Clark suggested, in his dissenting opinion (R. 120), that these cases deserve

Although this Court has never discussed the question in any opinion, its decision in *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, rehearing denied, 302 U. S. 779, indicates that the Court does not construe the statute to require proof of violation as a prerequisite to enforcement. There is nothing in "reexamination" in the light of the numerous cases, arising on petitions to review Commission orders, in which enforcement was granted without regard to violation. See *infra*, n. 12.

See also H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5, discussing the bill which became the Wagner Act: "It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, *without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future.*" [Italics supplied.]

That was an action by the Commission to enforce a cease and desist order issued under Section 5 of the Federal Trade Commission Act prior to its amendment in 1938. The court of appeals reversed the order as to certain respondents, modified it in other particulars, and affirmed the remaining portions. The court then remitted the cause to the Commission as special master "to hear and report whether the respondents have complied with the provisions which are affirmed." 86 F. 2d 692, 698 (C. A. 2). This Court held that the court of appeals had erred in reversing or modifying all but one of the clauses in the Commission's order. It specifically held that clauses one and three of the order "should be sustained

practices does not bar enforcement of a cease and desist order prohibiting them.

The Commission itself is not precluded from issuing a cease and desist order under Section 5 of the Federal Trade Commission Act merely because the practices have been discontinued. Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U. S. 257, 260; Consolidated Royal Chemical Corp. v. Federal Trade Commission, 191 F. 2d 896 (C. A. 7); *Galler v. Federal Trade Commission*, 186 F. 2d 810, 813 (C. A. 7); certiorari denied, 342 U. S. 818; but cf. *Oregon-Washington Plywood Company v. Federal Trade Commission*, C. A. 9, No. 12,774, *et al.*, January 24, 1952. Nor will abandonment justify refusal to enforce such an order on petition by the Commission; *Federal Trade Commission v. Wallace*, 75 F. 2d 733 (C. A. 8). Similarly, discontinuance has been held immaterial in proceedings to review orders issued under Section 5 of the amended Federal Trade Commission Act. *Hershey Chocolate Corporation v. Federal Trade Commission*, 121 F. 2d 968 (C. A. 3); cf. *Bunte Bros. v. Federal Trade Commission*, 104 F. 2d 996 (C. A. 7).¹¹

¹¹ *In Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211 (C. A. 7), affirmed, 324 U. S. 726, the Commission had issued a cease and desist order directed to violations of Sections 2 and 3 of the Clayton Act. Respondents filed a petition to set aside the order in which they contended, *inter alia*, that they had complied with certain conditions in the order. The court held that this claim had not been proved, but went on to state that "Furthermore, the

The fact that enforcement has been directed practically without discussion of the issue in cases, both how well settled the practice is and how little opposition to it there has been. And, since the decision below, another court of appeals has flatly held that the Commission is entitled to enforcement upon affirmation notwithstanding the absence of a showing that violation of the order has occurred or is imminent." *Automatic Canteen Company of America v. Federal Trade Commission*, 7th Circuit, No. 10239, January 18, 1952.¹⁶ The court there stated that it was in accord with Judge Clark's dissenting opinion in the instant case that the court "does have the jurisdiction and the duty to order enforcement on the cross petition of the Commission."

B. A mere showing of abandonment of the illegal practices is no bar to enforcement

The court of appeals concluded that there was "uncontradicted evidence" that the practice of giving discriminatory discounts had been abandoned. We submit, however, that the issue of abandonment is irrelevant to the question of enforcement. Clearly, mere abandonment of illegal enforcement, a cross petition to enforce filed in response to a petition to set aside cannot be likened to an original enforcement application.

¹⁶ Copies of the opinion were attached to the Commission's supplemental memorandum in support of its petition for certiorari, filed with the Court on January 23, 1952.

Act and the Federal Trade Commission Act. It concluded a lengthy opinion with the following directive (333 U. S. 730) :

The Commission's order should not have been set aside by the Circuit Court of Appeals. Its judgment is reversed and the cause is remanded to that court with directions to enforce the order. [Italics supplied.]

Similarly, in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, this Court decides decision that had set aside a Commission order under Section 2 (a) of the Clayton Act. There the Commission had cross-petitioned for enforcement. The Court stated (324 U. S. 760) :
The Commission's order will be sustained. The judgment below will be reversed, and the cause remanded with instructions to enforce the Commission's order. [Italics supplied.]

These two cases indicate that in this Court's view enforcement is required upon affirmation. The Court did not remand for entry of an appropriate order—the normal practice if the scope of relief were a matter for the discretion of the court below—but specifically directed enforcement. The presence or absence of a cross-petition was not deemed significant.¹⁵

¹⁵ Since in our view the court has a duty to enforce whenever it affirms, the existence of a cross-petition is irrelevant.

In *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, this Court considered the validity of a Commission cease and desist order issued under Section 2 (a) of the Clayton Act and Section 5 of the Federal Trade Commission Act.¹³ The court of appeals had set aside the order on respondents' petition; the Commission had not filed any cross-petition. This Court held that respondents had violated both the Clayton

compatible with the view that the court's jurisdiction is original. Certainly the form of order entered is not determinative of whether the jurisdiction is original. Moreover, the cases erroneously assume that the same factors that control the granting of injunctive relief in a suit between private parties are similarly determinative of the government's right to enforcement of a valid Commission order. See *supra*, pp. 18-19.

¹³ Prior to 1938, the enforcement and review provisions of the Federal Trade Commission Act were virtually identical with those of the Clayton Act. In that year, however, the statutory scheme for enforcement of Commission orders under the former statute was drastically changed. Petitions to review were required to be filed within 60 days; Commission orders became final if no appeal was taken within that period; penalties were provided for violation of such final orders; enforcement actions by the Commission were eliminated; and the court, on a petition to review, was required to enforce the order to the extent it was affirmed. 52 Stat. 111, 15 U. S. C. 45.

The fact that the Clayton Act was not similarly amended at the same time specifically to require enforcement upon affirmative does not support Ruberoid's position. The changes in the enforcement procedures were only one part of the extensive amendments made in the statute. Congress did not then have before it any proposals for similar changes in the enforcement provisions of the Clayton Act. See the decision below, *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C. A. 7).

in his dissenting opinion, "The cases in support of this proposition are ~~too many~~ and too important to be dismissed on the ground that we think their discussion of the issue perforce inadequate" (R. 120).

(C. A. 5), certiorari denied, 310 U. S. 638; *Modern Marketing Service v. Federal Trade Commission*, 149 F. 2d 970, 980 (C. A. 7); *The Q. R. S. Music Company v. Federal Trade Commission*, 12 F. 2d 730, 733 (C. A. 7).

No cross-petition filed: *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 730; *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 400 (C. A. 1); *Santuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378, 380 (C. A. 2); *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 678 (C. A. 3); *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 520 (C. A. 6); *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 221 (C. A. 7), affirmed, 324 U. S. 726; *Carter Carburator Corporation v. Federal Trade Commission*, 112 F. 2d 722, 737 (C. A. 8).

There are contrary dicta in *Butterick Co. v. Federal Trade Commission*, 4 F. 2d 919, 913 (C. A. 2), certiorari denied, 267 U. S. 603, and *Federal Trade Commission v. Fairfoot Products Co.*, 94 F. 2d 844, 846 (C. A. 7), in both of which the court granted enforcement, and a contrary decision in *L. B. Silver Co. v. Federal Trade Commission*, 292 Fed. 752 (C. A. 6), decided almost thirty years ago. In these cases, however, the courts assumed that they were exercising original rather than appellate jurisdiction in reviewing Commission orders. They accordingly applied the general equity rule requiring a showing of threatened injury as a condition to enforcement. We submit, however, that the jurisdiction involved is clearly not original. It is rather a "special statutory jurisdiction." Cf. *Federal Trade Commission v. Bulme*, 23 F. 2d 615, 618 (C. A. 2), certiorari denied, 277 U. S. 598. The provision in Section 11 of the Clayton Act, that the Commission's findings if supported by substantial evidence are conclusive upon the court, is hardly

deemed to have intended so cumbersome an enforcement technique as that produced by the decision below.

Moreover, failure to grant enforcement would lead to the issuance of merely advisory opinions by appellate courts. The court's jurisdiction would be invoked to determine the validity of the order, but no sanction would attach to flouting the judicial determination. The strong policy against judicial decision of abstract questions emphasizes the need for the court to decree enforcement whenever it affirms.

The almost unvarying judicial practice has been to order enforcement upon affirmation, whether or not the Commission has cross-petitioned for enforcement.¹² As Judge Clark stated in Act, and the two statutes were enacted and approved within a few weeks of one another.

Further evidence that Congress intended to make Commission procedures prompt and effective is found in the fact that both Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act (*supra*, p. 4), provided that "proceedings in the United States Court of Appeals shall be given precedence over cases pending therein, and shall be in every way expedited."

¹² Cross-petition filed: *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760; *Judson L. Thompson Mfg. Co. v. Federal Trade Commission*, 150 F. 2d 952 (C. A. 1); *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (C. A. 2); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607 (C. A. 4); *Sigynode Steel Strapping Co. v. Federal Trade Commission*, 132 F. 2d 48, 54 (C. A. 4); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 771 (C. A. 4); *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268

has conceded the court's jurisdiction, i. e. power, to grant enforcement on a petition to review (Br. in Opp. 8, 10, 14). As used in this context, "jurisdiction" refers only to the nature of the order that the court may issue, and not to any prerequisites to the exercise of the court's power. Applying to review proceedings the limitation deemed applicable by some courts to enforcement proceedings brought under Section 11 furthers no public policy. On the contrary, applying this limitation would handicap effective enforcement of the Clayton Act. Proceedings conducted by the Commission under that Act often are of long duration, involve extensive administrative hearings, and protracted review proceedings.¹⁰ Interposition of further administrative and judicial proceedings before a violator could be punished for disobedience would further increase the difficulty in securing compliance with the law and ease the path of the transgressor. Congress, which designated enforcement procedures to assure "the speediest settlement of disputed questions,"¹¹ is not to be

¹⁰ In *Federal Trade Commission v. Cement Institute*, 338 U. S. 683, the record of the administrative hearing comprised almost 100,000 pages, and was decided by this Court more than ten years after the proceeding was instituted.

¹¹ The quoted language appears in the Conference Report on the Federal Trade Commission Act, H. Rep. No. 1142, 63rd Cong., 2nd Sess., p. 19. The enforcement provisions of Section 5 of the original Federal Trade Commission Act (38 Stat. 719) are virtually identical with those of the Clayton

secure the full benefits of the adjudication and to terminate the litigation in a single suit." *Texas v. Florida*, 306 U. S. 398, 412. This would reduce the burden on the judiciary by eliminating separate enforcement proceedings if respondent failed to comply with the order. In construing Section 11 of the Clayton Act, the courts and the Commission are not to be regarded as "wholly independent and unrelated instrumentalities of justice," but as complementary agencies seeking to achieve "the plainly indicated objects of the statute * * * through coordinated action." *United States v. Morgan*, 307 U. S. 183, 194.

Moreover, no legally protectible interest of respondent is adversely affected by granting enforcement. Certainly respondent cannot be heard to complain of the loss of its right to disobey a judicially approved order. Cf. *National Labor Relations Board v. General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2).

The provision in Section 11 of the Clayton Act, that the court shall have the "same jurisdiction" to affirm, set aside or modify on a petition to review as on an application to enforce, makes it manifest that the court is empowered to grant the same relief no matter who initiates the proceedings. Thus the court is not limited to granting or denying the petition to set aside the order, but may also affirm, modify or enforce it. *Rubero*

the same showing of a threatened violation of its order as it must had it petitioned for enforcement" (R. 119). We submit that the court, in so ruling, failed to give effect to significant differences between the two types of judicial proceedings.

There is a sound practical reason why noncompliance with the order might be required in a direct enforcement proceeding, but not in a proceeding brought by a party against whom a Commission order runs. It was reasonable and appropriate for Congress to assume that where the parties affected sought no judicial review, the Commission's order would ordinarily be obeyed. Where there was, in fact, compliance, applications for enforcement would impose upon the courts a burden out of proportion to the advantage to the Commission in having the sanction of a court decree. In those cases in which the order was not obeyed, the Commission was authorized, by the statute, to apply for enforcement. Where, however, the scope or validity of the order is already before the court on a petition to review, entry of a decree enforcing those orders or parts of orders found to be valid imposes no additional burden upon the reviewing tribunal. Once the court has the controversy before it for final disposition, it should enforce the order "to a cross-petition. Cf. *Electric Thermal Co. v. Federal Trade Commission*, 91 F. 2d 477 (C. A. 9).

clear, then, and Ruberoid does not dispute (Br. in Opp., p. 3), that the juxtaposed words "affirm", "set aside" and "modify", when read in the context of the other language in the Section, clearly import the power to enforce. When an affected party files a petition to review, the court's power is not limited to affirming the order, but clearly authorizes enforcement. "Unless otherwise provided by statute, all the inherent equitable powers" of the court are available "for the proper and complete exercise" of the court's jurisdiction to "enforce compliance with the Act." *Porter v. Warner Holding Co.*, 328 U. S. 395, 398.

The court below was nevertheless of the opinion that in a proceeding instituted by a party against whom the Commission has issued a Clayton Act cease and desist order, the Commission, if it requests enforcement, is "required to make

* Some cases have treated affirmance as equivalent to enforcement, and have held respondents in contempt for violation of an order that was merely affirmed. *Pacific States Paper Trade Ass'n v. Federal Trade Commission*, 4 F. 2d 457 (C. A. 9), respondents adjudged in contempt, 88 F. 2d 1009; *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687 (C. A. 2), certiorari denied, 305 U. S. 634, respondent held in contempt, unreported order of June 5, 1941, No. 15694; *Leavitt v. Federal Trade Commission* (unreported), C. A. 2, No. 9037, orders of February 4, 1929, and December 24, 1935; but see *Federal Trade Commission v. Fairfoot Products Co.*, 94 F. 2d 844 (C. A. 7).
 * The court treated the Commission's request for enforcement contained in the last paragraph of its brief as equivalent

orders begins with the words: "If such person [the party directed to cease and desist] fails or neglects to obey such order of the Commission or Board while the same is in effect," the Commission may apply to the appropriate court of appeals "for the enforcement of its order." The paragraph, after providing for the filing of the administrative record and the giving of notice to the affected party, provides that the court "shall have power" to enter a decree "affirming, modifying, or setting aside" the Commission's order.

The paragraph relating to petitions to review by an affected party, however, makes no reference to violation of the order. It merely provides that "any [affected] party * * * may obtain a review" of the order by filing a petition to set it aside with the court of appeals. In such a proceeding, the court shall have "the same jurisdiction to affirm, set aside, or modify" the order "as in the case of an application by the Commission or Board for the enforcement of its order." [Italics supplied.]

These provisions are followed by a paragraph which states:

The jurisdiction of the United States court of appeals to *enforce*, set aside, or modify orders of the Commission or Board shall be exclusive. [Italics supplied.]

The three paragraphs thus use the words "affirm" and "enforce" interchangeably. It is

await him upon detection than if all he has to fear is an enforcement action. The public interest requires something more than mere empty affirmance of Commission orders. Such an unusual departure from sound judicial practice as would be entailed if proof of violation were required for enforcement on petitions to review should only be made on the clear showing that Congress specifically intended this anomalous result. As we demonstrate in Point IA, *infra*, Congress did not so provide in Section 11 of the Clayton Act.

I

THE COURT OF APPEALS WAS REQUIRED, UPON AFFIRMING THE COMMISSION'S CEASE AND DESIST ORDER, TO ENFORCE IT

A. Section 11 of the Clayton Act does not require a showing of violation of the order as a condition to enforcement.

Cease and desist orders issued by the Federal Trade Commission under the Clayton Act can come before a court of appeals in two ways: (1) Upon an application by the Commission for enforcement; or (2) on a petition by the affected party to set aside the order. However, the statutory prerequisites to judicial consideration are not alike in the two situations.

The paragraph in Section 11 dealing with actions brought by the Commission to enforce its

both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Railway Co. v. System Federal No. 40*, 300 U. S. 515, 552; see *Porter v. Warner Holding Company*, 328 U. S. 395, 398. The public interest to be protected in this situation is the effective prohibition of practices found illegal and ordered terminated by the Commission. The Commission, with its limited staff and extensive responsibilities, obviously cannot police our entire economy adequately to track down all violations of the laws it administers. A court should not withhold the aid of an enforcement order because of policy considerations in private litigation which are inapplicable to cases where protection of the public interest is the touchstone of procedural action. We think it unnecessary, however, for the Court to reach the question whether, on a Commission application for enforcement, it is a prerequisite that disobedience of the Commission order be shown. Whatever the merits of requiring proof of violation prior to enforcement when the Commission is the moving party, there is no basis for imposing this requirement in cases where the issue of enforcement arises on a petition to review filed by the affected party. To do so would leave a party who had unsuccessfully challenged a Commission order on the merits free to continue to flout the judicially approved order. Certainly a violator will be less likely to repeat his misdeeds if he knows that contempt proceedings

effective administration of the Act would be seriously burdened. Formal determination of violation is not a simple matter. It may require administrative proceedings almost as protracted as those necessary for issuance of the original order. And if Ruberoid is correct in contending (Br. in Opp., p. 13) that a Commission application for enforcement is "an original proceeding in the court of appeals sitting as a court of equity" (cf. In. 12, *infra*, pp. 27-28), the Commission might have to conduct a continuous inquiry, up to the very day of the judicial decree, for it would be as of that moment that the equity court would have to determine whether there is need for an injunction.

Clearly, the mere bringing of an enforcement action is itself an attestation by the Commission that it has determined that the affected party has failed or neglected to obey the order. The courts cannot assume, as the rule requiring proof of violation implies, that the Commission will callously ignore the specific directive of Congress that it should seek enforcement only where there has been a violation of the order.

Furthermore, whatever the rule may be as to requiring proof of threatened injury in the usual injunction suit between private parties, see *Connelly v. Massachusetts*, 282 U. S. 660, 673, a different rule should prevail where the Commission's aim is not vindication of a private right but protection of the public interest. "Courts of equity may, and frequently do, go much farther.

the issue of compliance, (4) the Commission decide the issue upon the basis of such record, or (5) the transcript of the proceedings be filed with the court. Nor is there authority for the court to remand to the Commission for taking additional evidence on the fact of non-compliance. Congress evidently contemplated that the judgment of the Commission as to whether an affected party had failed or neglected to comply with the order would be exercised solely on the basis of administrative investigation.

Under such circumstances, the court has no basis upon which it can adequately review Commission findings as to non-compliance. Such findings stand upon a different footing from cease and desist orders. The latter, required to be made after compliance with specified procedures, are the only orders that Congress has authorized the courts to review. Determinations as to non-compliance are not only independent of, but perforce must be made subsequent to, issuance of cease and desist orders. Congress, which explicitly dealt with an affected party's right to seek review of cease and desist orders, made no provision for similar review of non-compliance determinations by the Commission.

If the Commission were required to show non-compliance every time it sought enforcement,

¹² The Commission may, and does, on occasion, hold a hearing on the question of compliance (*Federal Trade Commission v. Standard Brands*, 189 F. 2d 510 (C. A. 2)), but it is under no statutory obligation to do so.

the language of Section 11 of the Clayton Act to justify this judicially imposed limitation on the Commission's right to obtain enforcement. The statutory provision that the Commission may seek enforcement "if such [affected] person fails or neglects to obey such order," is, to be sure, a Congressional directive to the Commission as to the circumstances under which it may go into court to seek enforcement. But it cannot properly be read as imposing a condition which a court must find to be satisfied before it can grant enforcement.

Although the statute requires the Commission to determine whether there has been non-compliance with the order before court enforcement is sought, it provides no procedure for making such determination. In contrast to the detailed procedure specified on petitions to review or to enforce the cease and desist order, the statute is silent on procedure where non-compliance is the issue. There is no requirement that (1) notice be given to the affected party, (2) a hearing be held, (3) an administrative record be made upon and enforced" (302 U. S. 117), and that clause seven "should be enforced" (Id., p. 118).

Respondent filed a petition for rehearing, alleging, *inter alia*, that the Court's action in directing enforcement of the order without proof of violation was improper (pp. 3-7). The Court denied the petition. 302 U. S. 779. On remand from the Supreme Court, the court of appeals enforced the order without further proof of violation (97 F. 2d 513 (C. A. 2)).

A party against whom an injunction is sought is not entitled to dismissal of the proceedings "as a matter of right" because it has discontinued the condemned conduct. See *National Labor Relations Board v. General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2); cf. *Hecht Co. v. Bowles*, 321 U. S. 321, 327. As the court pointed out in the *General Motors* case:

After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches to a finding against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily that will not be a counterweight to the *protection of which the plaintiff has shown he was once in need, and which he will need again, should the defendant change his mind.* [Italics supplied.]

Under the judicial review provisions of the National Labor Relations Act, Section 10 (e), 29 U. S. C. 160 (e), embodying the same general mere discontinuance, were it proved, would not justify us in refusing to enforce the order" (144 F. 2d 220). The court modified the order in one respect, but "affirmed and enforced" it in all others (*Id.* at 221).

scheme as Section 11 of the Clayton Act,¹⁸ the court is required to enforce a valid order of the Board on the Board's petition regardless of the other party's compliance with the order. *National Labor Relations Board v. Mexia Textile Mills*, 339 U. S. 563. This Court there stated (p. 567):

We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. * * * A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.

Moreover, "since the public interest is involved in a proceeding of this nature," the equitable powers of the court "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Holding Co.*, 328 U. S. 395, 398. The court is not

¹⁸ The National Labor Relations Board is authorized to issue cease and desist orders respecting unfair labor practices. No sanction attaches to violations of such orders until enforced by the court. The Board may apply for enforcement of the order, and any affected party may petition to review it. In either case the court of appeals has power to enter a decree "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." If the court denies the petition to review, it can at the same time enforce the order. See *Ford Motor Co. v. National Relations Board*, 305 U. S. 364, 371.

bound by traditional equity doctrines that may limit the exercise of its powers when only private rights are at issue. A respondent cannot block enforcement of a valid Commission order by showing abandonment, and thus remain free to resume the illegal practices as soon as the judicial proceedings have been concluded.

II

IF ENFORCEMENT OF THE COMMISSION'S ORDER UPON AFFIRMANCE IS DISCRETIONARY, THE COURT OF APPEALS ABUSED ITS DISCRETION BY DENYING ENFORCEMENT IN THIS CASE

In Point I, we have argued that under the statute the Court of Appeals has a duty to enforce the Commission's order upon affirmance. However, if this Court should disagree with us and conclude that enforcement is discretionary, we submit that the Court of Appeals abused its discretion by denying enforcement in this case.

The customary practice, grounded upon sound considerations of public policy, has been for the courts to enforce upon affirmance (*supra*, p. 26). Even if the statute leaves with the court a discretion to determine whether to enforce, we submit that the court should be required to exercise such discretion in favor of enforcement unless the violator can show special circumstances that call for an exception in the particular case. Enforcement should be the rule; refusal to enforce the exception. Mere abandonment of the illegal practices, with the violator left free to resume

them upon conclusion of the court proceedings, is not enough to justify departure from the usual rule of enforcement. "The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption * * *. To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum Co. of America*, 148 F. 2d 416, 448 (C. A. 2) (L. Hand, C. J.).

Thus the Court of Appeals' conclusion that there was "uncontradicted evidence" of abandonment¹⁹ would not, even if correct, justify its refusal to enforce. Moreover, it is clear that this acceptance of a contention never presented to the Commission is not supported by the record.

Ruberoid's claim of abandonment was first made in its petition for rehearing filed with the court below in June 1951. There Ruberoid asserted that "it appears from the record" that the discriminations had "ceased" by the time of the Commission hearing in 1946 (R. 105). Not only did Ruberoid present no evidence at such hearing in support of this contention,²⁰ but the

¹⁹ Judge Clark, in his dissenting opinion, stated that he believed that the majority was "seriously in error" in concluding that there was uncontradicted evidence that the illegal practice had been abandoned (R. 121).

²⁰ In its answer Ruberoid admitted the giving of discriminatory discounts to certain of its customers, allegedly because of "competitive conditions in the industry" (R. 6). Documentary and testimonial evidence introduced by the

testimony of its southern sales manager clearly suggested that the illegal discriminatory pricing practices were continuing. Although he twice denied that any discounts larger than the published ones were then being given (R. 15, 20), he indicated at other points in his testimony that "competitive conditions" in some areas might result in variations from the published discount schedules (R. 12, 20-21). Clearly something more substantial than such equivocal statements and vague hints are required to support a conclusion of "uncontradicted evidence" of abandonment.

In the court of appeals, Ruberoid did not sustain its burden of showing adequate justification for departure from the customary practice of enforcement. If the matter is one for the court's discretion at all, an appellate court should not be permitted, "in the exercise of the sound discretion, which guides the determination of courts of equity," *Beal v. Missouri Pacific Railroad Corp.*, 312 U. S. 45, 50, to handicap Commission enforcement of the law by denying enforcement of cease and desist orders on the tenuous showing made by Ruberoid in this case.

Commission conclusively established the giving of such discounts in 1941. Ruberoid presented no evidence in support of its assertion that "competitive conditions" had occasioned such discounts.

CONCLUSION

For the foregoing reasons, the decree of the court of appeals should be modified to reinstate the provision for enforcement of the Commission's order.

Respectfully submitted.

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